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No. 84-1711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM C. COX,

Petitioner,

v.

SUPREME COURT OF FLORIDA

and

FLORIDA BOARD OF BAR EXAMINERS,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

May the Supreme Court of Florida deny reciprocity to out of state lawyers.

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BRIEF FOR RESPONDENTS IN OPPOSITION

RULES INVOLVED

Article I, Section 8 of the United States Constitution provides in pertinent part:

> The Congress shall have power . . . to regulate commerce among the several states.

Article IV, Section 1 of the United States Constitution provides in pertinent part:

> Full faith and credit shall be given in each state to public acts, records, and judicial proceedings of every other state.

Amendment XIV to the United States Constitution provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Article 15, Section 1 of the United States Code provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, . . . is declared to be illegal.

Article 28, Section 1738 of the United States Code is set forth in the text.

Article V, Section 15 of the Florida Constitution is set forth in the text.

Article I, Section 1 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar is set forth in the text.

Article I, Section 2 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar states in pertinent part:

> There is hereby created a Florida Board of Bar Examiners consisting of twelve members of the Florida Bar and three lay members of the general public.

Article III, Section 2 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar states in pertinent part:

> No person shall be recommended by the Florida Board of Bar Examiners to the Supreme Court of

> Florida for admission to The Florida Bar unless such person first produces satisfactory evidence to the Board of good moral character and an adequate knowledge of the standards and ideals of the profession . . . .

Article III, Section 3 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar states in pertinent part:

> Prior to recommending an applicant for admission to practice the profession of law in Florida, the Florida Board of Bar Examiners shall conduct an investigation and otherwise inquire into and determine the character, fitness, and general qualifications of every applicant.

Article VI, Section 1 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar states in pertinent part:

> The Florida Bar Examination shall consist of a General Bar Examination and the Multistate Professional Responsibility Examination (MPRE).

Section 2 continues in pertinent part:

> Questions may be designated to require answers based upon Florida case or statutory law of substantial importance.

Section 7(c) reads in pertinent part:

> Each applicant must attain a scaled score of 70 or better or such scaled score as may be fixed by the Court.

Section 8 continues in pertinent part:

> Every qualified applicant who desires to repeat any part of the General Bar Examination shall file an Application for Admission into the General Bar Examination . . . .

Article VII, Section 1 of the Rules of the Supreme Court Relating to Admissions to the Bar is set forth in the text.

STATEMENT OF THE CASE

The Supreme Court of Florida and the Florida Board of Bar Examiners (Board) accept the Petitioner's Statement of the Case and would add the following material facts:

The admission of attorneys to the practice of law in Florida is a judicial function belonging exclusively to the Supreme Court of Florida. Article V, Section 15 of the Florida Constitution states:

> The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.

The Board is charged by the Supreme Court with the responsibility of determining an applicant's fitness and character to practice law.[1] The court requires this to be accomplished through a character investigation [2] and a written examination.[3] This is required of all applicants. Article I, Section 1 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar provides:

> The admission of attorneys to the practice of the profession of law is a judicial function. All individuals who seek the privilege of practicing law in the State of Florida shall submit to the Florida Bar Examination.

(One narrow exception to this rule deals with those persons who received a diploma from a Florida law school prior to 1954. See e.g. *In re Florida Board of Bar Examiners*, 307 So.2d 165 (Fla. 1975). This rule is inapplicable in the instant case.)

The written examination consists of three parts: the Multistate Professional Responsibility Examination, and

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[1] Fla. Sup. Ct. Bar Admiss. Rule, art. III § 2.

[2] Fla. Sup. Ct. Bar Admiss. Rule, art. III § 3.

[3] Fla. Sup. Ct. Bar Admiss. Rule, art. VI § 1.

a General Bar Examination consisting of Part A promulgated by the Board and including certain topics of Florida law, and Part B consisting of the Multistate Bar Examination. The Board has limited discretion on the content and grading of the examination.[4] Upon successful completion of the character investigation and examination, the Board recommends a candidate for admission. The Supreme Court of Florida has final authority on all admissions and rule changes. Article VII, Section 1 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar states, in pertinent part:

> Every applicant who has complied with the requirements of the applicable rules for admission into the Florida Bar Examination, who has attained passing scores on the examination required, who has met the requirements as to character and fitness . . . shall be recommended by the Florida Board of Bar Examiners to the Supreme Court of Florida for admission to the Florida Bar. If the Court is satisfied as to the qualifications of the application so recommended, an order of admission shall be made and entered in the minutes of the court . . . .

Petitioner has taken and failed Part A of the Florida Bar on three separate occasions. He has taken Part B and failed on two occasions. He has taken the Multistate Professional Responsibility Examination twice, passing once. Upon denial of admission in 1984, Petitioner petitioned the Supreme Court of Florida for reconsideration of his application. He did so in lieu of reapplying to take the written examination.[5]

On February 5, 1985, the Supreme Court of Florida denied Petitioner's petition without comment. Petitioner sought a Writ of Certiorari from this Court on April 30, 1985.

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[4] Fla. Sup. Ct. Bar Admiss. Rule, art. VI § 2(c).

[5] Fla. Sup. Ct. Bar Admiss. Rule, art. VI § 8.

SUMMARY OF ARGUMENT

Petitioner seeks review of Florida's policy of denying reciprocity to out-of-state lawyers, claiming it violates his constitutional rights and antitrust laws. However, it is settled that a state has a legitimate interest in the competency of its bar and that rules to insure competency need only have a rational basis to be acceptable. Also, this Court has decided that rules prescribed by a Board subject to the state supreme court are state actions and therefore immune from antitrust laws.

REASONS FOR DENYING THE WRIT

I. THE SUPREME COURT OF FLORIDA HAS NOT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT, NOR HAS IT DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

It is well settled that a state has broad power to prescribe the qualifications for admission to practice in its bar. *Leis v. Flynt*, 439 U.S. 438 (1979), *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), *In re Griffiths*, 413 U.S. 717 (1973), *Law Students Research Council v. Wadmond*, 401 U.S. 154 (1971), *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957). This Court consistently has upheld admission requirements which may operate to exclude out-of-state attorneys. *Hoover v. Ronwin*, —— U.S. ——, 105 S.Ct. 1338, 80 L.Ed.2d 590 (1984) (Arizona bar examination grading procedures), *Leis v. Flynt*, 439 U.S. 438 (1979) (Ohio court's decision not to admit attorney pro hac vice), *Norfolk & Westtern Railroad Co. v. Beatty*, 423 U.S. 1009 (1975), summarily affg 400 F.Supp. 234 (S.D.Ill.) (Ohio statute limiting appearances of out-of-state attorneys), *Brown v. Supreme Court of Virginia*, 414 U.S. 1034 (1973), summarily affg 359 F.Supp. 549 (E.D.Va.) (Virginia requirement making reciprocity conditional on intent to

practice in the state). In fact, Florida's rule not extending reciprocity has been implicitly upheld. *Leis v. Flynt*, 439 U.S. 438 (1979). At 439 U.S. 444, note 5, this Court stated:

> If accepted, the constitutional rule advanced by the dissenting opinion would . . . undermine the policy of those states which do not extend reciprocity to out-of-state lawyers, see, e.g. Ariz. Sup. Ct. Rule 28 (c)1; *Fla Rules of the Sup. Ct. Relating to Admissions to the Bar, Art. I § 1.* (emphasis added).

Petitioner argues that by not having a reciprocity agreement the Supreme Court of Florida and the Florida Board of Bar Examiners have violated the Fourteenth Amendment, Full Faith Credit Clause (Art. IV § 1) and Commerce Clause (Art. I § 8) of the United States Constitution and the Sherman Antitrust Act (15 U.S.C. 1 et seq. 1976 ed.). However, this Court and lower federal courts have decided that requirements similar to those in the instant case are constitutional and do not violate antitrust provisions.

Two tests are used to analyze claims under the Fourteenth Amendment, the "strict scrutiny" test and the "rational basis" test. Strict scrutiny has been used only with classifications involving invidious discrimination against an insular minority, such as race, *Loving v. Virginia*, 388 U.S. 1 (1967) or alienage, *In re Griffiths*, 413 U.S. 717 (1973). All other classifications must only be rationally related to a valid state objective. *In re Griffiths*, 413 U.S. 717 (1973). Licensing statutes have consistently been held to be a legitimate state purpose and only require a rational basis. *Pyler v. Doe*, 457 U.S. 202 (1982), *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957).

Lower courts also agree that licensing requirements are constitutional using the rational basis test. Requirements such as in the instant case have been upheld despite claims that they denied equal protection, *Hawkins*

v. Moss, 503 F.2d 1171 (4th Cir. 1974), *Shapiro v. Cooke*, 552 F.Supp. 581 (N.D.N.Y. 1982) aff'd 702 F.2d 46, *Ktsanes v. Underwood*, 467 F.Supp. 1002 (N.D.Ill. 1979), *Attwell v. Nichols*, 466 F.Supp. 206 (N.D.Ga. 1979) aff'd 608 F.2d 228, *Murphy v. State Board of Law Examiners*, 429 F.Supp. 16 (E.D.Pa. 1977), *Moore v. Supreme Court of South Carolina*, 447 F.Supp. 527 (D.S.C. 1977) aff'd 577 F.2d 735, cert. den. 439 U.S. 984, *Goldsmith v. Pringle*, 399 F.Supp. 620 (D.Colo. 1975), due process, *Galahad v. Weinshienk*, 555 F.Supp. 1201 (D.Colo. 1983), *Attwell v. Nichols*, supra, *Moore v. Supreme Court of South Carolina*, supra, and protection under the privileges and immunities clause *Hawkins v. Moss*, supra, *Galahad v. Weinshienk*, supra, *Shapiro v. Cooke*, supra. This Court has specifically excluded these types of rules from challenge under the Privileges and Immunities Clause. *Supreme Court of New Hampshire v. Piper*, 53 L.W. 4238, 4241 n.16 (March 4, 1985). In addition, lower courts are in agreement that licensing requirements do not infringe on the right to travel. *Hawkins v. Moss, supra, Shapiro v. Cooke*, supra, *Moore v. Supreme Court of South Carolina*, supra.

Licensing requirements have been held not to violate the Full Faith and Credit Clause of the United States Constitution. In *In re Lockwood*, 154 U.S. 1161 (1899), it was held that the right to practice law in a state does not attach until the applicant has fulfilled the professional or moral qualifications as prescribed by that state. 154 U.S. at 117. Lower courts have reached similar conclusions. *Galahad v. Weinschienk*, 555 F.Supp. 1201 (D.Colo. 1983), *Ricci v. State Board of Bar Examiners*, 427 F.Supp. 611 (E.D.Pa. 1977) vacated on other grounds 569 F.2d 782. Congress has prescribed the manner in which full faith and credit is to be afforded to proceedings in other jurisdictions:

> Such acts, records and judicial proceedings or copies thereof so authenticated, shall have the same full

> faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such state, Territory or Possession from which they are taken.

28 U.S.C. § 1738 (1976 ed.).

A state may only grant a license to practice within its borders. The Full Faith and Credit Clause may not be used to extend that license into other jurisdictions.

It is likewise settled that non-discriminatory requirements do not violate the Commerce Clause of the United States Constitution. *Hughes v. Oklahoma*, 441 U.S. 322 (1979), *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). Florida requires *all* bar applicants to pass an examination, testing the applicant's knowledge of both federal law and Florida law. Art. I § 1, Fla. Sup. Ct. Bar Admiss. Rules. The rule applies equally to residents as well as non-residents. It is within a state's prerogative to require an examination. *Shapiro v. Cooke*, 552 F.Supp. 581 (N.D.N.Y. 1982). aff'd 702 F.2d 46.

Finally, this Court has recently decided a substantially similar case and found licensing requirements did not violate the Sherman Antitrust Act. (15 U.S.C. § 1 et seq.) *Hoover v. Ronwin*, —— U.S. ——, 105 S.Ct. 1338, 80 L.Ed.2d 594 (1984). In *Hoover*, Ronwin complained that the Arizona Supreme Court's Committee on Examinations and Admissions (Committee) had developed a grading process that was unfair. Although an arm of the Supreme Court of Arizona, Ronwin claimed the Committee's rules did not rise to the level of state policy. As such, Ronwin asserted, the Committee was not immune from antitrust liability because their rules did not equal state action. The *Hoover* court disagreed, citing the complete control the Arizona Supreme Court had in deciding the scope of the Committee's authority and admissions of applicants. 80 L.Ed.2d 590, 605 n.30.

Article V, Section 15 of the Constitution of Florida gives the Supreme Court of Florida complete control of the bar admissions process. Like Arizona, the Supreme Court of Florida has delegated some authority to a Board in order to expedite the admissions process. Art. I, § 2, Fla. Sup. Ct. Bar. Admiss. Rules. However, this Board's authority is even more limited than the Arizona Committee. The Board may not determine the passing score, Art. VI § 7(c), Sup. Ct. Bar Admiss. Rules, nor does it have unlimited discretion in selecting the examination's content. Art. VI § 2, Fla. Sup. Ct. Bar Admiss. Rules. Thus, any action by this Board must fall within the scope of *Hoover*. State regulation of lawyers is constitutional even though it may decrease competition. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

Certiorari should not be granted in the instant case. This Court has previously dealt with the questions presented by petitioner. Likewise, lower courts are in harmony as to the invalidity of petitioner's claims. Reciprocity is not a right demanded by the Constitution. *Leis v. Flynt*, 439 U.S. 438, 443 (1979). This Court has implicitly upheld Florida's policy of not extending reciprocity. *Leis v. Flynt*, 439 U.S. 438, 444 n.5 (1979). In addition, the Supreme Court of Florida has explicitly recognized the constitutionality and overall fairness of Florida's policy requiring a written examination of all bar applicants. In *In re Russell*, 236 So.2d 767, 769 (Fla. 1970), the Supreme Court of Florida stated:

> Bar admission rules are matters solely within the province of the states. . . . No federal interests arise save when federal guarantees of due process and equal protection appear to be thwarted. . . . We see it clearly as our duty to admit to this special position of obligation and trust only those applicants, whether from Florida schools or elsewhere, who can satisfactorily demonstrate their credentials through a test of competence given under our supervision and control. We have examined our present policy

> anew and have determined that our rules and examinations are administered with fairness to all and favor to none. We have reviewed statistics on record with the Board of Bar Examiners here in Tallahassee, and we have found that currently, and for the past ten years, an applicant coming from out-of-state has had relatively the same high chance of passing the Bar examination as any other applicant.

236 So.2d at 769.

CONCLUSION

This Court has decided that denial of reciprocity does not violate constitutional rights. A written examination of all applicants bears a rational relationship to Florida's legitimate interest in a competent bar. In addition, action by a Board under the direct control of the state supreme court is state action, exempted from antitrust liability. Accordingly, the Petition for a Writ of Certiorari to the Supreme Court of Florida should be denied.

Respectfully submitted,

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